Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-892-99
GMackey/AKim

date:

to: Chief, Examination Division, Manhattan District
Attn: Robin Millman, E:QMS:A

from: District Counsel, Manhattan

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subject: [redacted]
Post-limitations Amended Claims for Refund

Uniform Issue List: 6402.01-02, 6511.05-00

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. It may contain confidential information subject to attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, it is subject to the attorney-work-product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination and is not a final case determination. The advice does not resolve the Service's position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum is in response to your request for advice on whether the statute of limitations bars the taxpayer's subsequent claims for refund because they were not made within the time prescribed by I.R.C. § 6511.

ISSUE

Prior to a final determination by the Service on the taxpayer's refund claims for years [redacted] and [redacted], whether the statute of limitations bars the taxpayer's subsequent claims for

refund because they were not made within the time prescribed by I.R.C. § 6511.

CONCLUSION

Post-limitations amended refund claims submitted by the taxpayer are timely where the Service did not take final action on the claims and the amendments are consistent with the facts set forth in the original claim. Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933); United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1932).

FACTS

The taxpayer, [redacted] ("[redacted]"), with a principal place of business in New York, New York, filed two Forms 843 (Claim for Refund and Request for Abatement), on [redacted]. [redacted]'s claims sought refund of a portion of the interest paid on assessed deficiencies for tax years [redacted] and [redacted] based on a decision in May Dep't Stores Co. v. United States, 36 Fed. Cl. 680 (1996). [redacted] attached its transcripts of account which it used to compute the amount of interest on its refund claims for years [redacted] and [redacted].

In a letter dated November 20, 1998, the Service notified [redacted] that its claims understated the correct amounts of interest overpayment by $[redacted] and $[redacted] due for its tax years [redacted] and [redacted], respectively. The Service informed [redacted] that the understatements were due to the taxpayer's computational errors apparently attributable to a computer program error which miscounted the number of days that interest accrued and failure to take into account an interest payment.

By letter dated [redacted], [redacted] responded to the Service's notice of error by requesting refund of the correct amounts of overpayment interest for the tax years [redacted] and [redacted] as determined by the Service. Subsequently, on [redacted], [redacted] submitted revised, amended claims with respect to tax years [redacted] and [redacted] containing new interest calculations based on Sequa Corp. v. United States, 99-1 U.S.T.C. ¶ 50,379 (CCH)(S.D.N.Y. 1998).

DISCUSSION

I.R.C. § 6511(a) provides that a claim for credit or refund of an overpayment of tax must be filed within three years from the time a return was filed or two years from the time the tax was paid, whichever of such periods expires later, or if no return is filed by the taxpayer, within two years from the time

the tax was paid. I.R.C. § 6511(b)(1) provides that no credit or refund shall be allowed after the expiration of the period of limitation prescribed in section 6511(a), unless a claim is timely filed. I.R.C. § 7422 provides that no suit may be maintained for the recovery of taxes unless a claim has been duly filed.

I.R.C. § 6611(a) provides that "[i]nterest shall be allowed and paid on any overpayment in respect of any internal revenue tax." The Code establishes two distinct procedures and two distinct statutes of limitations for claims for interest. Lyons v. United States, 93-1 U.S.T.C. ¶ 50,026 (S.D. Iowa 1993). A suit for a refund of interest previously paid by the taxpayer on demand of the Service is subject to the statute of limitations and the administrative-claim refund mechanism of I.R.C. §§ 6511 and 7422. Id. Interest on overpayments payable by the government is not subject to the administrative claim procedure and is governed by 28 U.S.C. § 2401(a). Id. Because [redacted] paid the interest on the deficiency that it now seeks to have refunded, the administrative claim procedures apply to its informal claims.

Treas. Reg. § 301.6402-2(c) requires that a claim for refund be filed on a form provided by the Service. Despite the requirement, however, informal claims can be valid claims. See, e.g., United States v. Kales, 314 U.S. 4156 (1940). [redacted]'s letter of [redacted] serves as a valid informal claim with respect to tax years [redacted] and [redacted] if the letter sets forth in detail each ground upon which the claims are based and sufficient facts to apprise the Service of the exact basis for the claims. Id.; Treas. Reg. § 301.6402-2(b). This requirement serves a dual function: it prevents surprise and gives the Service adequate notice of the claim and its underlying facts so that it can make an administrative investigation and determination regarding the claim. Boyd v. United States, 762 F.2d 1369, 1371 (9th Cir. 1985).

[redacted] filed its informal claims ([redacted] and [redacted]) after both the three-year and the two-year period of I.R.C. § 6511(a) had expired. However, an amendment of a specific claim after the refund claim period but before final disallowance is allowed if the amendment is based on the same facts stated in the original claim and requires no new investigation. Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933); Pink v. United States, 105 F.2d 183 (2d Cir. 1939); cf. Mutual Assurance, Inc. v. United States, 56 F.3d 1353 (11th Cir. 1995), nonacq. AOD CC 1999-014 (October 12, 1999)(in non-acquiescence, Service stating its position that a post-limitations amendment of a claim for refund is not timely where

Service has taken final action in allowing the refund claim); see Rev. Rul. 99-40, I.R.B. 1999-40 (September 16, 1999).

Where the grounds of a timely original claim are sufficiently stated, an untimely amendment has been allowed if it was germane to the original claim and set forth matters discovered in the course of the investigation of the original claim. Consolidated Coppermines Corp. v. United States, 296 F. 2d 743 (1961). Where an untimely amendment is inconsistent with the former claim or injects new and unrelated matters, however, it is not allowed. Id. Untimely amendments to timely claims are considered single timely claims if the original claim has not yet been disallowed and the amendment merely clears up matters that the Service has already considered or will consider in the original claim. Memphis Cotton Oil Co. v. United States, 288 U.S. 62 (1939). In effect, an untimely amendment that raises no new grounds relates back to a timely original claim that is still pending before the Service. Id.

"...[W]here a timely general claim is filed, and a subsequent specific claim follows before final action for a refund of the same taxes, the latter is an amendment to the former, and the two become "but a claim, single and indivisible, the new indissolubly welded into the structure of the old," especially where, as here, the identity of the amounts sought to be recovered is clear. United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933). In Memphis, the original claim lacked definiteness and the taxpayer was allowed to amend it. In contrast, in United States v. Henry Prentiss & Co., 288 U.S. 73 (1933), the amendment was so far reaching as to destroy the identity of the original claim or cause of action, and was not permissible after the statute of limitations had expired. Thus, "[w]here the amendment is inconsistent with the former claim, or has injected new and unrelated matter, we have not allowed it, but where it is germane to the original claim and sets up matter discovered in the course of the investigation of the original one, we have allowed it." Consolidated Coppermines Corp. v. United States, 296 F. 2d 743, 745 (Ct. Cl. 1962). See also, Addressograph-Multigraph Corp. v. United States, 78 F. Supp. 111 (Ct. Cl. 1948). In Addressograph, the taxpayer made no claim in its original request for refund of a right to amortization of engineering expense, although it did claim depreciation on other items, but in the course of the investigation by the revenue agent it was concluded that the taxpayer was entitled to such deduction. The court concluded that "the amendment merely made more definite the matters already within the knowledge of the Commissioner..." Addressograph,78 F. Supp. at 122.

"A taxpayer might obtain a recovery in his refund suit on a

ground other than that specified in his claim if he can establish adequate notification to the Internal Revenue Service of an intention to claim a refund on that ground." Union Pacific Railroad Co. v. United States, 389 F.2d 437 (1968). The test is whether the facts upon which the amended claim is based are such as would necessarily have been disclosed by the investigation of the original claim so that no additional investigation of the facts is necessary in order to pass upon the merits of the amended claim. Pink v. United States, 105 F.2d 183 (2d Cir. 1939). See e.g., Standard Lime and Cement Co. v. United States, 165 Ct. Cl 180, 329 F.2d 939 (1964) (Commissioner had been given timely notice of the ground for relief when percentage depletion allowance computation as a ground for refund was amended to use a different method). "[E]ach case must be decided on its own peculiar set of facts with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made." Newton v. United States, 163 F. Supp. 614, 619 (Ct. Cl. 1958).

[redacted]'s informal claims submitted on [redacted] and [redacted] are based on the same grounds as contained in its original refund claims - calculating when interest begins to accrue on a deficiency in tax if, pursuant to the taxpayer's election, the Service credited the reported overpayment against the taxpayer's estimated tax liability for the succeeding taxable year. As set forth in its original refund claims for tax years [redacted] and [redacted], [redacted]'s amended claims assert that the interest amounts were understated as the result of computational miscalculations. [redacted]'s amended claims are not inconsistent with the original claims especially since they rely on the same facts and same theory - use of money principle - as considered during the Service's review of the original claims for refund. See May Dep't Stores Co. v. United States, 36 Fed. Cl. 680 (1996), acq. in action on decision, 1997-008 (Aug. 4, 1997)(when a taxpayer elects to apply an overpayment to the succeeding year's estimated taxes, the overpayment is applied to unpaid installments of estimated tax due on or after the date(s) the overpayment arose, in the order in which they are required to be paid to avoid an addition to tax for failure to pay estimated tax under I.R.C. § 6655 with respect to such year); see also Sequa Corp. v. United States, 99-1 U.S.T.C. ¶ 50,379 (CCH)(S.D.N.Y. 1998)(Court opined that the interest on a subsequent tax assessment, up to the amount of the overpayment, begins to accrue on the due date of the subsequent year tax return. The Court reasoned that the overpayment was not "effective" as an estimated tax payment for the subsequent year and that the Service never lost the "use of the money"). Accordingly, it is our opinion that because [redacted]'s untimely amendments with respect to tax years [redacted] and [redacted] raise

no new grounds they relate back to the timely original claims that are still pending before the Service. Memphis Cotton Oil Co. v. United States, 288 U.S. 62 (1939).

Should you have any questions, please contact Attorney Anthony J. Kim at (212) 264-5473 ext. 238.

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